IN THE HIGH COURT OF JUDICATURE AT BOMBAY
O. O. C. J.

COMPANY PETITION NO.615 OF 2006

Ravindra Poonamchandra Angara. ...Petitioner.
Vs.
Swastik Heavy Structurals Pvt. Ltd. ...Respondent.

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Mr. H. D. Mehta i/b. Mr.D. L. Joshi for the Petitioner.
Mr. R. Shah with Ms. Sarita Dhuria i/b. Mr. Raval Shah for the Respondent.

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CORAM : DR.D.Y.CHANDRACHUD, J.
22nd March 2007.

P.C.:

The claim in the Company Petition is based on goods sold, supplied and delivered between May 2004 and June 2005 of an aggregate value of Rs.25,82,676/-. The Company is alleged to have made payment in an amount of Rs.16,54,206/- leaving a balance outstanding of Rs.9,28,470/-. According to the Petitioner, the goods were accepted without demur and invoices were forwarded to the Company. The Company issued two cheques drawn on the Cosmos Bank, being (i) Cheque No.381169 dated 23rd June 2005 in the amount of Rs.1,22,054/- and (ii) Cheque No.889081 dated 31st August 2005 in the amount of Rs.8,50,000/-. The cheques were returned by the bankers on 22nd October 2005 on presentation on the ground that the payment had been stopped

by the drawer. The Petitioner addressed a notice under Section 138 read with Section 141 of the Negotiable Instruments Act, 1881. By a letter dated 28th November 2005, the Company set up the plea that Cheque Nos.889081 and 888979 had only been furnished by way of a guarantee for the business transactions that were entered into between the parties against order Nos.4003, 4005 and 4012 placed by the Company. The Company's defence was that the Petitioner had deposited the cheques even though the dues against the aforesaid orders were paid by L.C. No.014/04-05 dated 24th March 2005 and L.C. No.003/2004-05, dated 23rd August 2004. The Company also stated that by its letters dated 5th October 2004, 28th November 2004 and 3rd December 2004, it had brought to the attention of the Petitioner its complaint in regard to the quality of the material supplied. Consequently, the Company stated that after reconciling the statement of accounts, the balance of the outstanding would be duly cleared.

The Petitioner issued a statutory notice before winding up under Section 434 of the Companies' Act, 1956 to which the Company submitted a reply dated 24th March 2006. In the reply, the defence was that undated cheques had been issued by the Company to the Petitioner as a guarantee for the business

transactions and that the Petitioner had wrongfully deposited the said cheques even though payments were made for the purchase orders of 24th March 2005 and 23rd August 2004.

Thereupon the winding up petition has been instituted. An affidavit in reply has been filed to the petition in which the defence is that undated cheques bearing Nos.889081 and 888979 had been furnished by the company to the Petitioner against the Company's orders bearing Nos.4003, 4005 and 4012. The Company contends that though payments against those orders had been duly made, by L.Cs. dated 24th March 2005 and 23rd August 2004 respectively, the Petitioner had wrongfully deposited the cheques. There were, according to the Respondent, deficiencies in the supplies effected by the Petitioner which were drawn to the notice of the Petitioner by letters dated 5th October 2004, 28th November 2004 and 3rd December 2004. Moreover, it has been submitted that one of the invoices (Invoice 1128 dated 8th July 2005) is false and fictitious. According to the Company, the Petitioner had delayed in the supply of goods resulting in a penalty being imposed on the Company by its own counter part.

In the affidavit in rejoinder filed on behalf of the Petitioner, the allegations contained in the reply have been denied.

The two dishonoured cheques, copies of of which have been annexed to the Company Petition are respectively a cheque bearing No.381169 dated 23rd June 2005 and a cheque bearing No.889081, dated 31st May 2005 respectively in the amount of Rs.1,22,054/- and Rs.8,50,000/-. In the replies addressed by the Company and in the affidavit in reply to the Company Petition, the defence as noted above, is that one of the two cheques viz., Cheque No.889081 was furnished by way of a guarantee. Subsequently a Sur-rejoinder dated 28th February 2007 has been filed in these proceedings stating that the other cheque, namely Cheque No.381169 dated 23rd June 2005 was also furnished merely by way of a collateral security. According to the Company, the cheque was issued against the purchase order (bearing No.SHSPL/ 4038/2005) dated 14th May 2005. However, it has been stated that the purchase order was never executed by the Petitioner and goods thereunder were never supplied. In the affidavit in sur-rejoinder, it has been reiterated that Bill No.1128 dated 8th June 2005 in the amount of Rs.7,47,650.50 is fictitious

and no goods were ordered or supplied thereunder.

In support of the Company Petition, it has been submitted that there is a debt due and payable on account of goods sold, supplied and delivered to the Company and the defence of the Company must be rejected. Undoubtedly, one of the circumstances that the Court will have to consider is that the two cheques that were issued by the Company were admittedly dishonoured on presentation. The defence of the Company is that the cheques were furnished only by way of collateral security and that the cheques came to be deposited even though the payments for the purchase orders in respect of which the security was furnished was duly made by L.Cs. dated 23rd August 2004 and 24th March 2005. In so far as the other cheque is concerned, the defence is that no goods were supplied under the purchase order dated 14th May 2005. In its affidavit in reply to the Company Petition, the Company has set up the defence that payments in respect of the specified purchase orders were in fact effected. The L.Cs. under which the payments have been made, have been specifically adverted to. The rejoinder filed by the Petitioner is a rejoinder of bald denial. The Petitioner has not explained whether

the L.Cs. under which payments were made, were to cover certain other purchase orders, apart from those which have been referred to by the Company. Similarly, the Company has relied on its letters dated 5th October 2004, 28th November 2004 and 3rd December 2004, copies of which have been produced at the hearing. Counsel appearing on behalf of the Petitioner fairly stated that the Petitioner had not sought inspection of the letters. During the course of the hearing of the Company Petition, Counsel appearing on behalf of the Respondent has produced on record copies of the letters dated 5th October 2004, 28th November 2004 and 3rd December 2004 addressed to the Petitioner, all of the letters bearing an acknowldgement of the Petitioner. The Company's letter dated 23rd September 2004 to the Cosmos Co-operative Bank Ltd. contained instructions to stop payment of the cheque in the amount of Rs. 8.50 lakhs on the ground that the payment had already been made through an L.C. dated 23rd August 2004. The Company also addressed a letter dated 24th August 2005 to the Petitioner drawing the attention of the Petitioner to the fact that Cheque No.381169 had been wrongfully deposited by the Petitioner despite the fact that the order had been cancelled on 25th May 2005. An acknowledgement appears at the

foot of the letter.

In these circumstances, it cannot be said that this is a fit and proper case for the exercise of the jurisdiction in winding up. There are triable issues which arise, which will have to be addressed on the basis of evidence that may be led in a suit for the recovery of the alleged dues of the Petitioner. During the course of the hearing, the attention of Counsel appearing on behalf of the Respondent was drawn to the fact that the Company had in the correspondence stated that it would reconcile the account and make the payment of the balance outstanding to the Petitioner thereupon. Counsel appearing on behalf of the Respondent has drawn the attention of the Court to a letter dated 10th June 2005 of the Company to the Petitioner forwarding a statement of account under which an amount of Rs.1,47,814/- is stated to be due and payable to the Petitioner. Counsel appearing on behalf of the Respondent has stated that the aforesaid amount which is admittedly due and payable to the Petitioner i.e. Rs.1,50,000/-, shall be paid forthwith. The statement is accepted.

The Petitioner will have to be relegated to the remedy of instituting of the suit for the recovery of the balance of the alleged

dues. The petition is accordingly dismissed.

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